82-993

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALAN PATRICK,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH DISTRICT COURT OF APPEALS
FOR SUMMIT COUNTY, OHIO

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STATEMENT OF THE QUESTIONS PRESENTED

I. Whether probable cause justifying the issuance of a search warrant is established by allegations in the affidavit that at best merely raise the suspicion, or assumption, that if a certain illegal activity was being conducted on the premises (i.e., gambling activity) then a search of the premises should reveal the presence of paraphernalia and other evidence usually related with such activity.

II. Whether the requirement that any property or things sought by a search warrant must be particularly described is satisfied by the generic designations of "U.S. currency" and "bank records" where the property so described cannot automatically be regarded as contraband, or evidence of any crime, and the warrant fails to set forth any basis for differentiating any property so described that was being legally possessed from that actually sought as contraband or as evidence of a crime by the warrant.

III. Whether any right conferred by the warrant in this case, to search a private home for evidence of illegal gambling, deteriorated into an unreasonble search when the police

proceeded to not only abuse the home itself, by ransacking it, but immediately following their entry required the occupants and guest to actually submit to the threat of armed force even though there was not even the suspicion that any of those so victimized were armed and dangerous.

IV. Whether property seized outside the catagories specified in the warrant can be admitted as proof of guilt.

V. Whether the evidence here which at best shows Petitioner's mere presence at the scene of a crime, was sufficient to support the verdicts returned herein.

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To the Honorable, the Chief Justice and Associate Justice of the Supreme Court of the United States:

The petitioner, Alan Patrick, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on October 13, 1982; when the Supreme Court denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B" in

the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C". Appendix "D" contains the Judgment Order of the Trial Judge finding the petitioner guilty. The Judgment Order denying the Motion to Suppress is designated as Appendix "E".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered October 13, 1982. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth in Appendix "F".

STATEMENT OF THE CASE [1/]

I

The record shows that Alan Patrick was charged with the offenses of gambling, Ohio Revised Code §2915.02 (A) (2), and permitting premises to be used for such

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1/ Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, are noted as "Appendix ___p.____".

purposes, Ohio Revised Code §2915.03 (A)(2). He was convicted of these offenses following a Bench trial.

Prior to trial, the Court considered various "Motions to Suppress and for the Return of Illegally seized property". The petitioner contends that the various affidavits, upon which the search warrants in this cause were based, failed to set forth probable cause to believe "any" of the property sought thereby could be located at the places to be searched.

At the hearing on these Motions, the facts clearly showed the two home computers, found on the premises and searched hours after the original entry, "were not specifically described in the search warrant". Also, it was admitted that the police not only had no information that there were any computers in the home to be searched (R 64), but that they had never encountered any computers in any previous gambling investigations.

The evidence also showed one computer containing information supposedly relating to the illegal numbers game had to in fact be activated. This event was originally said to have occurred only after the officers sent out for a computer expert. The evidence showed, in addition to considerable items of jewelry that were seized for obviously indefensible reasons that these officers confiscated some $12,000.00 the family had in their safe, along with the safe deposit keys located therein. This discovery was relied on as the sole basis for the issuance of the warrant to search the bank deposit boxes, which resulted in the seizure of $122,000.00 found therein.

II

The determinative questions relating to the search and the confiscation discussed below are aptly postured by the following segment of the testimony presented during the Motion to Suppress Hearing. The officer testifying, admitted to being in charge of the search (SH 44). Here it was testified:

Q. Okay. Now, you took $12,000 and some [odd] dollars out of the safe. Could you connect that money up to any gambling when you took it? At the time that you took it?

A. At the time I actually took possession of the money?

Q. Yeah.

A. At that time, no.

Q. No. You took it so you could see if you could connect it up later.

A. Right.

Q. You saw the key there. You took that as well.

A. Yes.

* * *

Q. Do you know what was in the box?

A. I had a good idea.

Q. You mean that you could guess.

A. Yes.

* * *

Q. Now, you are saying ...[is] the affidavit that we have here in court, which you used as a basis of the warrant, creates probable cause to believe that there ... [was] going to be some money out there. That's the essence of what you're telling me.

A. Yes.

Q. Nobody told you they ever delivered any money to that house, did they, before you went there?

A. No, sir, not me.

Q. Nobody ever told you they saw any money in the house, did they?

A. No.

Q. Nobody ever told you that they saw a safety deposit box key on the premises, did they?

A. No.

Q. You had no information that there was a computer there, did you?

A. Correct.

Q. Now, when you saw that computer, you thought as you testified before that it could be adapted for gambling purposes.

A. Yes, sir.

Q. So, you sent ...[for] the expert and then later you seized it.

A. Yes.

Q. Right. Now, after you got down to the station here, they searched that computer again; is that right? They got some additional information out of it?

A. That's correct.

* * *

Q. Did they get a Search Warrant to search that computer?

A. Not to my knowledge (SH 62-64). (Emphasis supplied.)

III

Another officer, Detective Randall Barath, testified to having seen Roberson go into a Barber Shop on North Howard, stay a few minutes and leave (R 273-274). Next, he saw Roberson make a stop at City Hospital and at a home on Division Street (R 275). This happened on March 31, 1981 (R 276). Later that same day Roberson was seen by Barath at Patrick's home. Although Barath and his partners did not

actually see Roberson enter the house itself, Roberson was seen leaving the premises about 30 minutes later (R 277). This officer says they again surveilled Roberson April 1, 1981 at the Hospital (R 277-278).

On April 2, 1981, Barath saw Roberson arrive at Patrick's house at 2:30 in the afternoon, stay for several minutes and then depart, making several stops of brief duration before returning to Patrick's home (R 278-280).

Significant here Detective Barath admitted on cross-examination that he had not seen, during these surveillances, Roberson break any laws (R 282). Also, the officer denied having seen Roberson drop anything off at Patrick's home (R 283). Indeed, he candidly admitted the most that could be said was that Roberson "was stopping [at these several places] for some reason... [but he did not] know what the reason was" (R 284). Nor did he know why Roberson stopped at Patrick's home (ibid).

Detectives Smith and Hill were the other officers with Barath on the surveillances of March 31, April 1, and April 2. In his evidence Smith exaggerated how on one occasion, they had been following Roberson all over the West Side of Akron while Patrick was in his car as a passenger (R 295). The date referred to turned out to be April 2, 1981. However, his police report only showed Patrick was picked up at his home at 2:30, on April 2, by Roberson and stops were made on Trigonia, on Rhodes, on Douglas and on Nathan Streets. Alan Patrick was then

dropped off at a tire store in suburban Barberton, Ohio (R 300). What is significant here, is that it was the above route that the officer referred to as being "all over the West Side of Akron" (R 301). Also, Detective Smith, in response to questions put forth by the Judge, specifically testified that April 2, 1981 was the first time that he was close enough to see Patrick and that he really did not know at the time that "Patrick" was the person they were looking at (R 304).

Finally, we have the testimony of Detective Hill, who did know and, at all times, could identify Alan Patrick. Hill testified that he, and that had to include Detectives Barath and Smith, had Roberson under constant surveillance (R 336) from the last day in March, 1981. Hill testified, without equivocation, that he only saw Patrick with Roberson on April 2, the day Patrick was dropped off at the tire store in suburban Barberton.

IV

In a nutshell, the prosecutor's position, as was specifically argued to the Court in Summation, was that "The State ha[d] met its burden in showing that Alan Patrick was in the house having custody of the house, that the computers [with gambling information in them] were in the house and that... [this shows] the premises were used in gambling in violation of §2915.02" (R 378).

Actually, the evidence reon for Patrick's conviction is not in serious dispute. For, despite certain grandiose

promises, made in the State's opening statement, acquittals were rendered by the Court in favor of Patrick's wife and Brown, both of whom were arrested and charged (R 382). If nothing else this fact rather dramatically demonstrates the State's failure to prove that "Alan Patrick was indeed running a gambling house, that he was gambling with the aid of Sandra Patrick, was also operating a gambling house in her workings with the computer and also Barry Brown" (R 6-7).

What the evidence does show is the very exploratory search that was indeed made of Patrick's home on April 24, 1981. It also shows the testimony by the various officers referred to above, regarding surveillances made by them. Additionally, the arrest of a Charles Roberson, who was stopped and his car searched, was established. This event, which also took place on April 24, 1981 (R 268), produced, in addition to some blank pads, a particular pad dated April 24, 1981 with some numbers on it.

At best, the evidence upon which the guilty verdicts had to be based only shows that Patrick, who just happened to be home when the police arrived, admitted them upon being advised of their purpose. His wife and Brown, both of whom were charged and acquitted, were found in the room where the two home computers were located. Both testified that Brown was trying to teach Mrs. Patrick to operate the device so that it could be programmed to accomodate the various real estate operations the Patricks were involved with. (The fact that there was no writing, number pads, slips or the like that could

have been used as source material for the numbers and figures in the computer is another fact that must be reckoned with.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The various arguments made below make it most apparent the conviction of Alan Patrick must be reversed. While the conviction itself is indefensible for a number of reasons, certain testimony developed during the Suppression Hearing shows the extreme need for this court to intervene in this cause if for no other reason than to emphasize that the issuance of a search warrant (1) does not provide the officers executing it a license to ransack. And (2) it does not have the effect of automatically depriving individuals present during its execution of their basic rights.

Here we refer to testimony showing these officers were convinced they had the right to order the homeowner, whose premises were being searched and ransacked by the police, "to sit in a certain place and [to] deny him the right to use the phone" (SH 55) even to "call an attorney" (SH 57). Significant here, while the reasons given by the police for taking this drastic action are serious enough (SH 56-58); a police officer's testimony as to being unaware that they were suppose to leave the property in the condition they found it (SH 58) is a type of "insolence of office" that must be curtailed at all cost. Even this is not all, one of these officers truly believed (as he testified) that the police had the power not only to ransack (SH 59) this home, but to take money out of Mrs.

Patrick's purse, and her personal jewelry (R 421-425). Further, this officer was convinced that if need be they actually had the power "to damage ... [the] home" to remove a built-in safe in order to open it at their convenience (R 22). These ill-conceived and ill-advised notions of the Akron Police Department, which have been sanctioned by the various Ohio Courts below, are in serious conflict fundamental criteria as articulated by this Court. That theme has always required the conduct of the police to be reasonable. United States v. Pratter, 465 F.2d 227 (7th Cir. 1972) and United States v. Likas, 448 F.2d 607 (7th Cir. 1971).

Of course, our main contention is that the affidavit simply failed to set forth cause to believe any of the property sought could be located in Petitioner's home. Hopefully then this Court will be persuaded by the arguments made below that missing from the affidavit was the "critical link in the chain of facts and circumstances" alleged to support the issuance of any warrant to search Patrick's home or person. See United States v. Lockett, 674 F.2d 843 (11th Cir. 1982).

Finally, the point is made by Petitioner that the seizure of the money, from the home and the deposit box cannot be justified under fundamental criteria. See United States v. Giresi, 488 F. Supp. 445, 459 (D.Md. 1980).

I. The Conclusion That Probable Cause Existed To Justify The Issuance Of A Search Warrant Is Not Established By An Affidavit Which Merely Raises The Suspicion Or Assumption That If A Certain Criminal Activity Is Taking Place On The Premises, Then A Search Thereof Should Reveal The Presence Of Paraphernalia And Other Evidence Usually Related To Such Activity.

In defending the issuance of the search warrant for the Petitioner's home, the State rather understandably has relied on the tenet, originally expressed in United States v. Ventresca, 380 U.S. 102 (1965), that an affidavit should be analyzed from a commonsense standpoint. On the other hand, our assailment of the State's position starts with the idea that to justify theissuance of any search warrant the prevailing axiom is that there must be a meaningful showing that property subject to seizure can be located in the place to be searched. See Rice v. Wolff, 513 F.2d 1280, 1285, rev'd on other grounds, 428 U.S. 465 (1976). Simply put, the nexus between the places searched and the property sought by virtue of the warrant is always critical to the question as to whether probable cause to search for such property is set forth in the affidavit. United States v. United States District Court, 407 U.S. 297, 316-317 (1972).

As to the sufficiency of the affidavit to support any belief the described gambling paraphernalia and "U.S. Currency" related thereto would be in the Patrick home, see United States v. Scott, 555 F.2d 522 (5th Cir. 1977), and the cases cited therein at pages 526-528. There, as here, it was shown that no one was even credited by the affiant with having seen, or having any knowledge as to the presence of, the property sought by the warrant in the home searched. Significant here, the court specifically deemed critical the averment, in the Scott affidavit, that:

> All of the sources and informants named Moore as the person in charge of the Atlanta numbers game during 1973 and 1974. The affidavit further recited that in the experience of affiant, persons engaged in illegal number lotteries usually kept lottery items in their headquarter residences and vehicles and specifically set forth information and indicating that Moore was in fact transacting lottery-related business at home. Id., at 527.

Based on the above quoted analysis, the court in Scott then jumped from a belief that Moore, the person victimized by the search, was shown by the affidavit to be the "boss" of the numbers operation to the conclusion that he would have

gambling paraphernalia in his home. While we still maintain Scott was wrongly decided on this point, and should have been reviewed by this Court, cert.denied, 434 U.S. 985 (1977), the case at least exposes the presence of certain vital factual flaws in the affidavit relied on for the search here. Not only did this affidavit fail to articulate any specific basis for the affiant's belief that particular property would be in Alan Patrick's home, it also failed to credit the affiant with the belief based, as it is usually said, on his experience that there was a good likelihood that such property would be in the house.

In the present case, the sole basis for the affiant's belief that the property ultimately specified in the warrant could be found in, or at, the places to be searched was based on the following rather omninum-gatherum averment that:

> "Affiant believes and has good cause to believe that there is not being illegally possessed, pursuant to the commission of a gambling offense, contrary to §§2915.02 and 2915.03 of the Ohio Revised Code, certain books, records, U.S. Currency, bank records, and gambling paraphernalia consisting of slips of paper with numbers listed on the face thereof and commonly known as numbers slips, paper slips, phones, phone records, scratch pads, tablets, adding machines, envelopes, tally sheets and other items

used for gambling in violation of Ohio Revised Codes §§2915.02 and 2915.03."

The master affidavit that formed the basis for numerous warrants simultaneously executed at various locations in Akron on April 24, only referred to Petitioner and/or his home in ¶¶3,40,76,100,102,104, and 106.

¶¶3 & 40 merely furnished descriptions of our Petitioner and his home. ¶76 contained the naked assertion, attributed to some nameless informant that Patrick was in the informant's estimation, "The largest numbers man in Akron."

¶¶102,103, & 106 show an individual named Robinson was seen by police on March 31, at 11:15 driving on Howard street, making a stop on Division street, returning to Howard, then going to an address on Lods street next to a bar and from there to Patrick's home arriving at 2:42 p.m. On April 1, at 12:00, Robinson was again seen on Howard street, from there he went to a hospital, to Division, to Jay Ave., back to the bar on Howard street and from there to Patrick's home where he stayed until 2:55 p.m. On April 2, at 2:30 with two unknown passengers he departed and after stopping at several different addresses he returned to Patrick's home at 4:45 p.m. The other reference (in ¶100) simply states that on March 24, a car, later identified as Robinson's arrived at Patrick's home at 2:40 p.m.

Our thesis is supported by the reasoning in United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), where the court concluded on the basis of somewhat comparable factual allegations that:

> The affidavit revealed no factual observations...[showing the contraband was] at Flanagan's residence. The inference that the goods were, or might be, at Flanagan's residence was entirely the District Attorney's. Id.at 747.

Indeed, the Flanagan court held that the affidavit raised no more than a suspicion that property subject to seizure could be located in the home. Id., at 747. See also United States v. Taylor, 599 F.2d 832 (8th Cir. 1979) and Commonwealth v. Taglieri, 390 N.E. 2d 727 (Mass. 1979).

See also Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966), which, like the situation here, involved a search made in connection with an alleged gambling operation. The court there emphasized, in a comparable situation, that:

> There was nothing in either the officer's affidavit or his statement that... [the] residence was, or was reputed to be, a place where gambling was being carried on, so as to entitle any cards or dice he might possess there to be made the subject of search and seizure as instrumentalities of such an establishment. Id., at at 5-6.

The fact that the above statement from Gillespie was premised by the idea that neither "cards nor dice nakedly constituted contraband", Id., at 5, adds to our contention that there was no probable cause to believe that any of the property listed in the "boiler plate" language of our affidavit would indeed be in the home. This same point was made in Montilla Records of Puerto Rico v. Morales, 575 F. 2d 324 (1st Cir. 1978). There the court expressly refused to even "signal a rule allowing general warrants with a generic description to issue solely on evidence that particular and easily differentiated contraband of that description was to be found on the premises... [because to do so] would be an unnecessary and dangerous dilution of search warrant requirements," id., at 327.

Again, the point being made is that the assertion in the affidavit, even as supported by the inferences reasonably drawn therefrom, simply do not support the conclusion that probable cause existed to search Patrick's residence or to seize his funds. United States v. DiNovo, 523, F.2d 197 (7th Cir. 1975) and United States v. Quinn, 454 F.2d 29 (5th Cir. 1972). Stated another way, the facts alleged in the affidavit failed to establish a nexus between Patrick's home and the evidence sought or seized. United States v. Green 634 F.2d 222 (5th Cir. 1981) and United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977).

II. Since Probable Cause To Search For, And To Seize Particularly Described Property Is Not Supplied By Conjecture, Assumption Or Mere Guesswork It Follows That Unless The Particular Property Sought, Here "U.S. Currency" And Records, Can Be Automatically Regarded As Contraband, An Instrumentality, Or Even Evidence, Of A Crime, Other Factors Further Describing The Specific Property To Be Seized Must Be Set Forth In The Warrant.

Our concerns here centralizes the warrant's direction that any "U.S. currency" found on the premises was to be seized. And, the ultimate seizure of the $122,000.00 from the safe deposit boxes. Of course, it simply cannot be denied that these officers regarded any money found on the premises as being subject to seizure. Proof this was their belief is magnified by testimony showing that not only was money in Mrs. Patrick's purse taken, but so was her wedding rings.

Money, to be sure, does not take on any criminal or evidentiary character absent other factors that demonstrate it has some connection with a criminal offense. Thus, it must be the law, even in Ohio, that more of a description of any money to be seized, assuming the warrant was otherwise sufficient, was required than the mere general description "U.S. currency". Indeed, as put by

one court a warrant must give the officer "information by which he could select certain property within the description in the warrant and refuse to take other property equally well described in the warrant." People v. Prall, 314 Ill. 518, 145 N.E. 610 at 612 (1924); People v. Holmes, 20 Ill. App. 3d 167, 312 N.E. 2d 748 (1974). In Holmes, the warrant sought "an undetermined amount of United States currency". There it was reasoned that the description "United States currency" was too vague and that a more general description of the denominations and approximate amount of the currency should have been given.

The holdings in Prall and Holmes, seem especially compelling since they expose the conclusion that money and the other physical property listed in the warrant would be on the premises as being purely an assumption by the affiant. Also, implicated in this analysis is the idea that the particularily requirement of the Fourth Amendment has as one of its purposes precluding officers executing warrants from actually seizing property for which he lacked probable cause to believe was connected with a particular criminal activity. See also United States v. Burch, 432 F. Supp. 961 (D. Del. 1977) aff'd 577 F.2d 729 (3d Cir. 1978), where the description of, among other things, "automobile tapes... [and] other unknown articles which are believed to be stolen from Penn Central Railroad" was held to be a general warrant. The Burch holding seems most relevant since there was no support in our affidavit for the required determination that there was probable cause to believe any money on

the premises would be sufficiently connected with a gambling operation to justify its seizure. Here, of course, there was absolutely no basis for any belief the money seized by these officers could ever be so connected. See Commonwealth v. Taylor, 418 N.E. 2d 1226 (Mass. 1981) and State v. Sweat, 427 Atl. 2d 940 (ME. 1981).

III. The Right To Search A Private Home Granted By A Warrant Does Not Confer On The Police The Right To Ransack And To Otherwise Abuse The Premises Or Its Occupants And Guests, And When Such Conduct Occurs Its Magnitude Can Cause A Search That Would Otherwise Be Lawful To Deteriorate Into An Unreasonable Search That Offends Constitutional Rights.

In this case, the evidence clearly shows that when the police arrived they were readily admitted. The officers then laid seige on the home in a fashion that can only be described as totally outrageous. Here, the evidence shows that at the very inception of the search itself, these officers, with drawn guns literally required those in the home to freeze and to remain in such a position for an inordinate period of time (R 419-420). All those present were personally searched by the rampagers despite the fact that only a warrant to search the petitioner and his home had been issued. Also, in prostituting the orders of the court to conduct a search for certain evidence, wilfully furniture was damaged and garbage

trash dumped on the floor and carpet.

It is recognized that "a warrant to search for contraband grounded on probable cause implicitedly carries with it the limited authority to detain its occupants on the premises while a proper search is conducted". Michigan v. Summers, 452 U.S. 711 (1981). This, however, is not to say that the police can in fact treat the people who happened to be present as though they are under arrest. In our case, the lawfulness of the police officers' conduct with regards to Petitioner and the others who were present in the home must be measured by tenets that distill from Ybarra v. Illinois, 444 U.S. 85 (1979) and Dunaway v. New York, 442 U.S. 200 (1979).

In Ybarra the point was made that nothing in Terry v. Ohio, 392 U.S. 1 (1968) "can be understood to allow a generalized cursory search or, indeed, any search whatsoever for anything [on an individual] but weapons". 444 U.S. at 93-94. Of course, it cannot be denied that the original testimony was that it was hours after the seizure before the computer was activated and what was regarded as a gambling print-out developed. Yet, the way all of those on the premises were treated before anything that could possibly be contraband was located, cannot logically be distinguished from the way they would have been treated if under arrest. See United States v. DiRe, 332 U.S. 581 (1948).

Surely, it will be agreed that the right to search a home only authorizes just that-- a search. And, who would

sisting of... [certain other generally enumerated items]". We start with the clear and precise testimony by the officer that not only were they unaware of the presence of any computer in the home, but they had never encountered any computer in their investigations.

Again, the facts also show that to abuse the premises by a general ransacking and by illegally restraining and searching the person of others, for who they did not have search warrants these officers willfully and arrogantly seized personal jewelry from the safe and from the person of Mrs. Patrick. In addition, they took records and data that obviously related to real estate and other legitimate business transactions on their own authority.

While the jewelry and certain records were ultimately returned by the police (SH 61-62), this response can hardly exonerate their seizure, or otherwise save this search from being deemed general or exploratory. In our judgment the seizure of the jewelry, the funds from Mrs. Patrick's purse, and her wedding rings can no more be justified than can the seizure of computers and the computer diskettes.

It is because the computers and the diskettes furnished the only evidence in this case that could possibly provide a basis for Patrick's conviction that our concentration on its seizure will be more intense. As was true with the jewelry, the money and even the safety deposit box keys, it cannot be seriously argued by the State that it was "immedi-

argue that the right to search authorizes the police to act other than reasonably--a concept that is decidely at odds with the type of abusive conduct that was visited on this defendant's home. Also, a right to search on the basis of a warrant must be distinguished from a right to arrest. Hence, police conducting a search have no right to prevent any person on the premises from seeking legal counsel. This follows unless it can be said that one who is placed under arrest has the right to immediate access to counsel, but if his home is being searched he lacks such a right. (See SH 55, et. seq.).

The overall conduct of the police in this case during the execution of the warrant can be favorably compared with the conduct of the F.B.I. agents at the offices of the Founding Church of Scientology in In Re Search Warrant, the case cited above. There the court found that the conduct of the agents was the type of egregious violation of constitutional requirements that require an application of the exclusionary rule to the property seized. 436 F.Supp., at 692.

IV. The Seizure Of Property Outside The Categories Specified In The Warrant Violates The Particularity Requirement And Calls For The Suppression Of All Property Seized.

The warrant instructed and the police were directed to seize "certain books, records, U.S. currency, bank records and gambling paraphernalia con-

ately apparent" to the police that, although not listed in the warrant, these computers were in fact evidence or contained evidence in its memory banks. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). Also, see State v. Williams, 55 Ohio St. 2d 82, 377 N.E. 2d 1013 (1978), where the Ohio Supreme Court viewed a generalized suspicion, such as these officers had with reference to the computers (SH 64) as not making the evidentiary value of such property "immediately apparent." Cf. State v. Wilmoth, 1 Ohio St. 3d 118 (1982).

All this makes it clear that the seizure of the computers and the diskettes, which were outside the list of property to be seized, should not have survived our contention that the Motion To Suppress was improperly denied. The fact that the officer originally forthrightly conceded that, although he felt the computer could possibly be a criminal tool, he could not make that judgment until the computer was activated (SH 50-51), which occurred after the expert had been sent for, Id., at 52-53, is most critical. Indeed, it was his testimony that it was only after the expert created a printout that he then concluded the computer "could have been used for gambling operations." (SH 68) (Emphasis added). On this rather critical point see Stanley v. Georgia, 394 U.S. 557 (1969), where officers found reels of film while searching a home for gambling paraphernalia, which they viewed with a projector found on the premises. There the point was made, in the concurring opinion, that this conduct amounted to an illegal search.

See also United States v. Rettig, 589 F.2d 418 (9th Cir. 1978), where because of the conduct of the agent in deliberately failing to advice the court issuing the warrant of the intended scope of the search an otherwise valid warrant was struck down. The critical point in Rettig was that the agents interpreted and executed the warrant as "an instrument for conducting a general search." Id., at 423. Cf., In Re Search Warrant, 527 F.2d 321 (D.C. Cir. 1977) cert. denied, 438 U.S. 925 (1978).

V. Evidence Is Insufficient To Support A Guilty Finding Where, Making All The Reasonable Inferences In Favor Of The State, A Reasonable Juror Could Not Find From Such Evidence Guilt Beyond A Reasonable Doubt.

Jackson v. Virginia, 443 U.S. 307 (1979), establishes the constitutional standard for any meaningful review of the sufficiency of the evidence to support a conviction. Relevant to that question, as postured here, is the cogent principle that presence at the scene of a crime here, the illegal possession of "gambling paraphenalia" by someone in a defendant's home, alone never suffices to prove guilt beyond a reasonable doubt even of illegal possession. Compare State v. Haynes, 25 Ohio St. 2d 264 (1971). Indeed the law in Ohio had been thought to be clear beyond any possible doubt that "the mere presence of an accused at the scene of some crime and the fact that he is acquainted with the perpetrator

is not sufficient proof, in and of itself, that he was an aider and abettor." Columbus v. Russell, 39 Ohio App. 2d 139 (1973), and State v. Clifton, 32 Ohio App. 2d 284 (1972).

The above analysis, when applied full strength to the search warrant affidavit and to the evidence presented at the trial, shows and mirrors the extent to which Alan Patrick has been victimized both by the denial of his Motion to Suppress and by the guilty verdicts rendered against him.

We know, of course, that none of the officers who reported even having seen Alan Patrick during the various surveillances ever saw him doing anything. In fact, the evidence presented as proof of guilt only shows him as having been seen on April 2, 1981 in company with a Charles Roberson (R 304 and 336). Thus, even if Roberson was indeed picking up numbers, and there was no proof he was, Patrick's presence in the car would not be proof of any joint criminal venture or endeavor as between those two. And, just as surely this fact would have no tendency to prove Patrick was also guilty of the crimes for which he stands convicted.

As to the information in the computers, said to be evidence of an illegal numbers programs, the most that can be said is that Alan Patrick also lived in the home. Still the fact to be reckoned with is there was no proof, indeed the opposite was shown, that he even knew how to work the computers (R 429-430). Also, both of the acquitted Defendants

testified to their exclusive use of the machines (R 392 and 429). When the irrepressible thrust of this evidence is augmented by the idea that there was no source information on the premises that could possibly have been used to create the so-called programs in the computer (-- that is, any records of wagers and the like) further belies any argument either that the computers were involved in charged offenses or that Patrick was involved with any criminal use of the computers.

In any event, one must look in vain for proof that Alan Patrick indeed committed the charged offenses. This is so even though there may be every reason to speculate as to his possible guilt. For who can deny that any such speculation would be contrary to the admonition in In Re Winship, 397 U.S. 358 (1970), that:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. Id., at 364.

So postured, a fair distillation of the Trial Court's articulated findings,

which ostensibly lead it to convict, really leaves one with the feeling that the Judge must have indulged in conjecture, supposition and speculation to reach his verdicts. See Appendix "D", at page A21. But these are not the things proof of guilt should be made of.

First, we refer to the Court's findings that on October 1, 1981, Patrick was in Charles Roberson's car when Roberson made several stops at a certain private residence and businesses in the city. Id., at A18. Second, there is the finding that stored in the memory bank of one of the two computers found in the petitioner's home was information said to be related to a computerized numbers operation. Id., at A19.

Our point is that while all this may very well be true, the question still remains: where is the proof that Alan Patrick was criminally involved? As to this question the Court will surely agree that due process necessitates a reversal where no rational trier of fact could have found the essential elements of the crimes charged here were proven beyond a reasonable doubt. Jackson v. Virginia, supra, 443 U.S. 307 at 319 (1979).

This court will surely agree that more than Patrick's mere presence in his own home (even supposing his wife and a guest in the home were in fact working in an isolated room on a computer that contained in some of its memory banks a gambling program) was required to justify his conviction in the case. United States v. Willis, 646 F.2d 189 (5th Cir.

1981), seemingly would support this thesis. The same is true of United States v. Jackson, 588 F.2d 1046 (5th Cir), Cert. denied, 442 U.S. 941 (1979) and United States v. Stephenson, 474 F.2d 1353 (5th Cir. 1973).

This rationale seems especially compelling here since unlike the situation in Jackson it was not shown Patrick was even near the contraband. (In Jackson the defendants came very close to entering the room where the contraband laden luggage was located.) In Stephenson the proof only showed an apparent suspicion that he was involved in Drugs. There was no proof he had any actual contact with the drugs that were found in the Bar.

So in this case, while there is proof of Patrick's presence in the house when the "contraband" figures were located in one of the computer's memory banks, which computer also contained evidence it was being programmed to accomodate a legitimate real estate operation.

We concede the presence of a reluctance to reverse any criminal conviction. What, however, cannot be overlooked remains. This case should not be closed out with out any court having articulated a meaningful resolution of our chief complaints. Simply put the facts here support the untenable notion that Patrick was convicted as a sacrifice. For the chief issue here brought into conflict Patrick's guarantee that any guilt on his part should have been based on sufficient evidence and the State's

interest in conviction because someone was responsible for the gambling information being in the computers.

Given the absence of any real proof of Alan Patrick's guilt, this Court ought not be another trough from which the State satisfies its thirst for a validated conviction of Alan Patrick. This idea will become even more compelling when this Court attempts in vain to plot the evidence in this case against the elements of the charged offenses. For any evidence that can possibly be devined from this record will not reach that degree of probative force the law requires for a conviction. State v. Stiles, 179 N.E. 2d 76 (Cuy. Cty., Ohio 1962).

CONCLUSION

This case dramatizes the cogency of the point, emphasized by Justice (then Judge) Stevens, in United States v. Pratter, to the effect that "the execution of a warrant is a job for a professional, trained both to perform his mission and to heed the... command to show a decent respect for the privacy of the citizen" (465 F.2d, at 231). And, it screams out for this Court to make it clear that probable cause remains the standard required to support the issuance of a warrant.

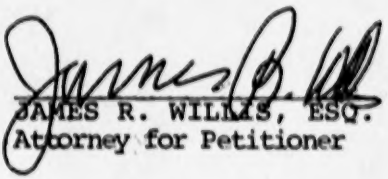
For all of the foregoing reasons it is respectfully submitted that the Petition for Writ should be granted.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner for Writ of Certiorari was mailed to the office of Saundra Robinson, Akron City Prosecutor, 53 E. Center Street, Akron, Ohio 44308, this 7 day of December, 1982.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

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THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1982 TERM
)	
City of Columbus.)	To wit: October 13, 1982

State of Ohio,	) No. 82-1039
	) AND CROSS-MOTION
Appellee/Cross-Appellant	) MOTION/FOR AN ORDER
	) DIRECTING THE COURT OF
vs.	) APPEALS
	)
Alan Patrick,	) for SUMMIT County
	)
Appellant/Cross-Appellee	) TO CERTIFY ITS RECORD

It is ordered by the Court that this motion and cross-motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James R. Willis

Motion Fee, $20.00, paid by City of Akron

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19__

_____ Clerk

_____ Deputy

APPENDIX "A"

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,)	1982 TERM
)	
City of Columbus.)	To wit: October 13, 1982

State of Ohio,	) No. 82-1039
	) AND CROSS-APPEAL
Appellee/Cross-Appellant)	APPEAL/FROM THE COURT OF
	) APPEALS
vs.	)
	)
Alan Patrick,	) for SUMMIT County
	)
Appellant/Cross-Appellee)	

This cause, here on appeal as of right from the Court of Appeals for Summit County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19__

_____ Clerk

_____ Deputy

APPENDIX "B"

STATE OF OHIO) IN THE COURT OF APPEALS
)SS:
COUNTY OF SUMMIT) NINTH JUDICIAL DISTRICT

CITY OF AKRON Plaintiff-Appellee v. ALAN PATRICK Defendant-Appellant)	C.A. NO. 10428 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT OF THE COUNTY OF SUMMIT OHIO CASE NO. 81 CRB 3295

DECISION AND JOURNAL ENTRY

Dated: June 16, 1982

This cause was heard March 2, 1982, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, P.J.

Defendant-Appellant, Alan Patrick, appeals from his conviction and sentencing for the offenses of gambling and operating a gambling house, as well as from the court's order confiscating approximately $134,000.00 which had been seized as a result of the search of Patrick's home and a safe deposit box. We affirm the convictions, but vacate the order of confiscation and remand for further proceedings as to the confisca-

APPENDIX "C"

tion.

FACTS

After over four months of police investigation into suspected gambling operations in the city of Akron, including surveillance of persons suspected by police of being involved in said operations, law enforcement officials made application for and were issued separate warrants to search the residence of Alan Patrick, among several others, for gambling paraphernalia, phones, and U.S. currency.

The affidavit for the search warrant was executed by Detective Larry Lambes of the Akron Vice Squad. The affidavit details the surveillance of eight vice squad members as they watched the trafficking of some 24 different individuals in and out of 14 different houses and commercial establishments while utilizing 17 vehicles in going from place to place. The affidavit describes the frequency of the 24 named individuals at the various places and in the presence of and association with each other. Three of these persons were known to have been convicted of various gambling-related offenses. The officers found physical evidence such as slips and records with numbers, names and initials indicative of a "numbers type" gambling operation in the abandoned trash of six of the houses. Some of the same names and initials were found in the trash at different locations.

The 31 page affidavit containing 109 items with numerous sub-items, chronicles and logs the travels and brief

stops during various weekday afternoons of many of the persons named frequently in the affidavit.

Police officers executed the warrant on April 24, 1981. Upon entering the home, police observed two home computers, the screen of one of which showed the words: "Advanced, Declined, Unchanged." Recognizing that these terms signified a numbers game based upon daily stock quotations, the officers summoned a police computer expert to the Patrick residence who confirmed that the computers were being utilized in a gambling operation. The computers and various "diskettes" containing gambling data and programs were seized as gambling paraphernalia.

During the course of the search, police officers discovered a large locked safe. In response to demands that he open the safe, Patrick requested permission to call an attorney. This request was denied. Patrick finally opened the safe after police threatened to remove the safe from the premises. The contents of the safe, including $12,000 in cash and a key to a safety deposit box were seized.

Primarily on the basis of the key found in the safe, a second warrant was issued to the police for a search of the safety deposit box. This search revealed that the box, registered in the name of Patrick's mother-in-law, contained approximately $122,000.00 in cash, which was also seized.

Patrick's pre-trial motion to suppress the evidence on the basis of the

illegality of the searches and seizures was overruled, and the case proceeded to a bench trial.

A large portion of the state's evidence was supplied by a computer expert who explained the data contained in the computers. Patrick was found guilty of gambling and operating a gambling house in violation of R.C. 2915.02 (A) (2) and R.C. 2915.03 (A) (2), respectively.

By a separate entry and without further hearing, the trial court ordered the confiscation of the $134,000.00, ostensibly pursuant to R.C. 2933.41 (C).

ASSIGNMENT OF ERROR I

> "The court erred in determining that the search warrant affidavit set forth probable cause to believe that a search of the appellant's home would disclose the various items the seizure of which was authorized thereby, and in concluding that the search made of, and the seizures made from, the home here involved were, in fact, reasonable."

At the outset, we recognize that it is not necessary to make a prima facie showing of criminal activity in order to establish probable cause to search. An affidavit for a search warrant need only establish the probability that certain enumerated items will be found in the place sought to be searched. Beck v. Ohio (1964), 379 U.S. 89, 96. The issuing magistrate is allowed broad discretion

to make this determination of probable cause, and once made, courts of review ordinarily afford a great deal of deference to such a finding. Jones v. United States (1960), 362 U.S. 257, 270-271; Aguilar v. Texas (1964), 378 U.S. 108,111.

Although a search warrant which has been issued in total or partial reliance upon information obtained from an informant will be viewed more critically by a court of review in evaluating whether probable cause has been demonstrated, we nevertheless conclude that the affidavit in the instant case is sufficient to support a determination of probable cause to search the home of Alan Patrick for evidence of gambling offenses.

The affidavit recites that police surveillance of two houses commenced with suspicious complaints by private individuals to the vice squad. From there we view an ever-widening circle, encompassing more and more houses and more and more individuals in a pattern which common sense and experience tells any police officer or independent magistrate that this is a "numbers or policy" type gambling operation. The physical evidence found in the trash bags, the frequency of association with each other, the times of day involved, the exchange of small brown bags, the patterns of brief stops, as if making pick-ups and deliveries, as well as the late afternoon congregating at one or more locations, when lumped together lead to that reasonable inference. The affidavit also has eye-witness information from one police officer who observed an exchange of money and overheard conversations in the barber shop of Marion Dixon

and the pool-room of Joe Tolliver which clearly shows the involvement of each place in a numbers-type gambling operation. Those commercial places at 36 and 38 N. Howard Street were leased by Dixon and Tolliver. Both have had recent convictions for keeping a gambling house.

Patrick argues, however, that there is nothing to tie him to the operation except for an informant's statement and the appearance of Charles Roberson at his home on four occasions over a ten day period.

The informant's statement contained in the affidavit is that:

> "***'the biggest numbers' man in Akron is Alan Patrick.' He received some of his bets through Ruby Calhoun. Alan Patrick is known to be living on the west side and also owns the red brick apartments at Fourth and Chittenden Streets, Akron, Ohio."

The affiant confirmed Patrick's residence and ownership of the apartments. The affiant also says: "This information source has proved to be reliable previously."

Patrick argues that the informant's statement was an unsupported conclusion which does not meet the two-pronged Aguilar-Spinelli Test. In Aguilar the court said:

> "***.
>
> "Although an affidavit may be based on hearsay information and

need not reflect the direct personal observations of the affiant,***the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed,***was 'credible' or his information 'reliable.' ***."

Aguilar v. Texas, supra, at pg.114.

Patrick argues that the issuing magistrate was not apprised of any underlying circumstances from which the informant gained his information and from which the officer concluded the informant was reliable.

We hold that the second prong is met by the affiant's knowledge that the informant had been previously reliable. State v. Karr (1975), 44 Ohio St. 2d 163. The first prong of the test, however, must fail unless it can be found to be corroborated by other independent sources. In Spinelli the Supreme Court said:

"***.

"The informer's report must first be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, the other allegations which corroborate the information

> contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?***."

Spinelli v. United States (1969), 393 U.S. 410 at 415. We do not believe it is necessary to that corroboration for the police to establish that Patrick was the "biggest numbers man" in Akron. We only believe it necessary to corroborate that it was probable that he was involved and that gambling paraphernalia would probably be found at his residence.

Patrick is linked to the probable numbers-type gambling operation by Roberson. The affidavit chronicles Roberson's activities between March 4 and April 3 showing him to be frequenting the places and associating with the persons described in the affidavit as engaged in the "numbers" scheme. The inference that there is a numbers ring in operation is reasonable when the conduct of the various named persons is analyzed. All of them are intertwined. Roberson's documented trips to and from Patrick's house does not mean that those days named were the only days he went to Patrick's. The inference must be made that the surveilling officers were observing an established pattern as part

of the ring. We are only dealing in probabilities and not certainty. As Justice Goldberg said in United States v. Ventresca (1965), 380 U.S. 102, 108:

> "***.
>
> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."
>
> "***."

The logical probability is that Patrick was likewise engaged in criminal activity with Roberson and the others and that it was probable that gambling paraphernalia might be found in his house.

Defendant next alleges that the search warrant was deficient, in that with respect to the warrant's direction to seize "U.S. Currency," the warrant failed to comport with the constitutional requirement of specificity and particularity.

In support thereof, defendant argues that the search warrant empowered the executing officers to seize all U.S. currency, no matter how small the denominations or insignificant the sum.

Although the police expected to find large sums of currency, i.e., sums in excess of $100,000, an exact amount was impossible to specify or accurately determine. Moreover, it si quite well settled that a technical violation is a search warrant does not invalidate the seizure of items that would have been otherwise validly seized had the warrant been more specific.

In the instant case, police seized the sums of $600 and $12,000 and $122,000. The $600 taken from Mrs. Patrick's purse was subsequently returned to her.

Patrick also alleges that the computers and the computer "diskettes" were improperly seized, in that the computers and diskettes were not specifically named in the search warrant. Patrick claims that items not specifically named in a warrant may not be seized unless the "plain view" doctrine is applicable. Under that doctrine, an item not named in the warrant is subject ot seizure if it is found in "plain view;" its discovery by police officers was inadvertent;

and the incriminating nature of the item is immediately apparent to the police officers executing the warrant. Patrick argues that the latter requirement was not met by the computers and the diskettes. We disagree.

The search warrant authorized the seizure of phones, U.S. currency and gambling paraphernalia. One of the executing officers, Officer Alexander testified that when first discovered, one of the computer screens showed the words "Advanced, Declined, Unchanged." Based on his experience and knowledge of the numbers games, he immediately deduced that the computers were being used in the gambling operation; therefore, the computers were seized as gambling paraphernalia pursuant to the search warrant.

Finally, contrary to defendant's assertion, we cannot find that under the circumstances the search of Patrick's house was unreasonable.

ASSIGNMENT OF ERROR III

> "There is insufficient evidence as a matter of law to support the guilty verdicts in this case."

As stated in State v. Eley (1978), 56 Ohio St. 2d 169:

> "A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt."

Applying this principle to the facts of the case at bar, we conclude that there is ample evidence to sustain the judgment of conviction for the violations of R.C. 2915.03 (A) (2), i.e., permitting his residence to be used for gambling, and R.C. 2915.02 (A) (2), that being the specific offense of gambling.

It is undeniably true that the home computers owned by Patrick and found in the residence owned and inhabited by Alan Patrick were used as part of a gambling operation. The reasonable and logical inference is that Alan Patrick also controlled the operations of these computers.

ASSIGNMENT OF ERROR II

> "The court erred in ordering certain property forfeited and in failing to order the return of such property to the defendant."

Although not specifically named in the trial court's order, it is clear that the court was acting pursuant to R.C. 2933.41 which provides, in pertinent part:

> "(A) Property that has been lost, abandoned, stolen, or lawfully seized or forfeited, and that is in the custody of a law enforcement agency shall be safely kept pending the time it is no longer needed as evidence, and shall be disposed of pursuant to this section.
>
> "***.
>
> "(C) A person loses any right he may have to possession of property:

"(1) That was the subject, or was used in conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and such person is a conspirator, accomplice, or offender with respect to the offense;

"(2) When, in light of the nature of the property or the circumstances of such person, it is unlawful for him to acquire or possess it.

"(D) Unclaimed and forfeited property in the custody of a law enforcement agency, shall be disposed of on application to and order of any court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities, ***."

In light of the holding in the recent case of State v. Lilliock (1982), 70 Ohio St. 2d 23, construing the above quoted statutory provisions, we reverse and vacate the trial court's order of confiscation and remand the cause for further consideration.

SUMMARY

Accordingly, the judgments of conviction are affirmed. The order of confiscation is vacated and the cause remanded for further proceedings on the confiscation as provided by law.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Akron Municipal Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22 (E).

Costs taxed to appellant.

Exceptions.

Presiding Judge
- for the Court -

VICTOR, J.
QUILLIN, J.
CONCUR

APPEARANCES:

SAUNDRA ROBINSON, City Prosecuting Attorney, 53 E. Center St., Akron, OH 44308 for Plaintiff.

JAMES R. WILLIS, Attorney at Law, Suite 1609, Bond Court Bldg. 1300 E. Ninth St., Cleveland, OH 44114 for Defendant.

IN THE MUNICIPAL COURT OF AKRON
SUMMIT COUNTY, OHIO

CITY OF AKRON	)	CASE NO. 81 CRB 3295
	)	
Plaintiff	)	JUDGE MURPHY
	)	
v.	)	FINDING AND JUDGMENT
	)	
ALAN PATRICK	)	
	)	
Defendant	)	

This cause came on to be heard before this Court commencing on the 22nd day of September, 1981. The defendant, Alan Patrick, having waived a trial by jury and consenting to the Court hearing the evidence on the affidavits presented, to-wit:

Count #1: Ohio Revised Code 2915.02 (A) (2) that the defendant, Alan Patrick on or about the 24th day of April, 1981, did establish, promote, operate or knowingly engage in conduct which facilitates any scheme or game of chance conducted for profit.

Count #2: Ohio Revised Code 2915.03 (A) (2) that on or about the 24th day of April, 1981, the defendant, Alan Patrick, being the owner and lessee or person having custody, control or supervision of premises known as 978 Wooster Avenue, Akron, Ohio, did recklessly permit such premises to be used or occupied for gambling in violation of Section 2915.02 of the Revised Code.

The defendant also having been charged with a violation of Section 2913.51 of the Ohio Revised Code, to-wit: receiving stolen property, and the prosecutor moving to dismiss said charge, the Court hereby grants same and said affidavit is

dismissed as against this defendant.

FINDING OF FACT

This Court has considered all of the evidence presented to it, both direct and circumstantial, and makes the following findings of fact in reference thereto.

1. On the 1st day of April, 1981, the defendant, Alan Patrick, while accompanied by one Charles Roberson, another defendant, made certain trips throughout the City of Akron, Ohio engaging in a series of stops at private residences and business establishments for periods of two or three minutes to fifteen or twenty minutes. The testimony of the Akron Police Department's surveillance teams indicated a certain route which was repeated by Mr. Roberson alone on April 2nd and thereafter until approximately three days before the arrest and execution of a search warrant on April 24, 1981, and in each case stopping at the residence of Irene Weary, 548 Douglas Street, Akron, Ohio and ending at the house owned and occupied by the defendant, Alan Patrick, 978 Wooster Avenue, Akron, Ohio. (See record for testimony of Officer William R. Smith, Arthur C. Hill, and Randall A. Barath.)

2. On the 24th day of April, 1981, the said Charles Roberson was arrested and from his vehicle came State's Exhibit "T" which appeared to be the historic pad with three-digit numbers written thereon.

3. On the 24th day of April, 1981, a certain search warrant was executed by the Akron Police Department, having probable cause to believe a numbers operation, i.e. an illegal scheme or game of chance was being operated in the City of Akron, Ohio. This warrant was for the premises of 978 Wooster Avenue for illegal gambling para-

phenalia, U.S. currency and records of said gambling operation.

While on the premises, Detective George Alexander saw certain computers, one of which was introduced in evidence and marked Exhibit "U", turned on and with the code on the screen called "Advances-Declines-Unchanged". Being familiar with what is called a "numbers operation" he testified he did not touch the set for fear of losing any information in its data banks or memory. Immediately, another Akron police officer, Joseph Carron, was called to the scene, being an expert in the use of said computers (See the record for his testimony.) After Officer Carron had examined the equipment and given direction to the computer to reveal its contents, see printouts marked as exhibits, he was in the position to give an opinion that the memory banks of said computer along with certain diskettes seized by the police, contained programs referred to in evidence as HB-1, HB Scan, ADD-1 and notably, HISTIT as Exhibit "K" known as the file on the CR. His was "All of the programs and the information contained on the diskettes taken together show a "computerized numbers operation'."

They reveal a system of placing bets in this computer, having been programmed to calculate a 30 and 10 percent profit for the writer and collector of bets, and an analysis of where the bets came from, whether any of the numbers were the "hit" for that day and the payoffs to the various bettors which had to be returned to the collector of the bets.

4. The above information alone would not reveal the total operation had it not been for the testimony of one Irene Weary of 548 Douglas Street, one of the stops consistently made daily by Charles Roberson and with this defendant on

the 1st day of April, 1981 (See paragraph 1).

The testimony she offered indicated that she was a "collector" of bets and her name appears as Irene, Account Number 7, on Exhibit "K". It is further noted that on the day in question, November 24, 1981, she bet number 128. That testimony is corroborated by State's Exhibit "M" wherein the recapitulation of the day's bets of Account Number 7 (previously referred to as Irene 7 on Exhibit "K") shows a bet of number 128 boxed, as she indicates meaning playing in house 1, 2, and 3, which houses or combination of bets was described by Officer Carron as the numbers operation used in the Akron area.

The collection of cash, distribution to the bettors, writers and collectors, is further corroborated by those individuals described by Irene Weary as "Bob" and "Ted" who arrived at her premises at 2:50 or 3:00 p.m., which matches the times testified to by the officers on the surveillance teams who had to be none other than Charles Roberson and Alan Patrick. However, she did not know their proper names.

The trail is clear.

5. The large amounts of cash, both in the safe at the defendant's home and taken from a certain safe deposit box under search warrant with a key from the defendant's home further support the prosecution's contention of a large-scale "numbers operation".

CONCLUSION OF LAW

It is incumbent on the courts to become as sophisticated as the criminal with their use of tools and tactics borrowed from the business community. This gambling above described was aided and enhanced by the use of computers freely

available these days to anyone. They are also simple enough in their operation so with little or no training one can program various activities, both legal and non-legal, for their own use. It only makes the job of law enforcement more difficult, time consuming and expensive as was evidenced in this case.

This was not the historic observation of the passing of money and the writing of certain numbers on small white pads. It involved a large-scale operation assisted by modern accounting methods. However, this is no less of a crime. It is inescapable that the defendant, Alan Patrick, was guilty of the crimes alleged in both affidavits by his operating this scheme of chance and also the use of his premises, recklessly permitting it to be used for gambling. The evidence presented is sufficient to convince this Court beyond a reasonable doubt, and I so find the defendant guilty of both counts.

The defendant is hereby ORDERED to appear for sentencing at 8:30 a.m. on October 22, 1981, before this Court.

James E. Murphy
Judge

cc: Nancy Kelley, Assistant City Prosecutor
James R. Willis, Attorney for Defendant

IN THE MUNICIPAL COURT OF AKRON
SUMMIT COUNTY, OHIO

CITY OF AKRON	)	CASE NO. 81 CRB 3295
	)	
Plaintiff	)	JUDGE MURPHY
	)	
v.	)	JUDGMENT ORDER
	)	
ALAN PATRICK	)	
	)	
Defendant	)	

This cause came on to be heard before this Court upon evidence being adduced at a hearing May 27, 1981, upon the record and filings presented in the within case.

This Court specifically finds that the search warrant denominated Defendant's Exhibit 2 was issued upon probable cause supported by an affidavit for search warrant denominated State's Exhibit A. It is inescapable that the many months of investigation by the Akron Police Department focused on the property of the defendant known as 978 Wooster Avenue, Akron, Ohio, and that there was cause to believe that gambling paraphenalia, phones and U.S. currency as evidence the crimes set forth in the affidavit accompanying said warrant would be located at that address. As such, the search cannot be deemed "unreasonable" and as violative of the Ohio or United States Constitution in that regard.

Further, the defendant complains that certain computers taken under the authority of said search warrant were "different property" and not listed on said warrant. From the evidence these computers may have been used to determine the outcome of the gambling activity complained of as was demonstrated from the evidence. "Gambling paraphenalia" should not be construed so as to frus-

trate the purposes of law enforcement in this modern day and age. One normally thinks of gambling paraphenalia as dice, cards, roulette wheels, etc. However, as the criminal becomes more sophisticated in the application of new techniques so ought the officers engaged in law enforcement, as they view these activities in their modern context. A computer which records either the records of gambling or a determination of the results of a "numbers" operation such as was done here must be considered in that context. The evidence presented shows that Sandra Patrick at the time of the search was engaged in the use of one of the computers and certain "numbers" were visible on the screen. The officers were not unreasonable in calling in during the search another officer conversant with the use of these machines and then supplying a "printout" which merely recorded the numbers being visualized on said screen. The Court rules that that was done during the search of the premises and was reasonable in light of the facts presented. An article to be subject to seizure in the carrying out of a lawful search must have played a significant role in the commission of the crime alleged. See United States v. Stern, et al, 225 F. Supp. 187 (U.S.D.C.)

The next major thrust of the defendant's argument is that of the safe deposit box key, number 1749, taken in the search under the initial search warrant designated Defendant's Exhibit 1. This key was seized and the officers returned and drew a new affidavit for search warrant and were granted a search warrant to search said "safety deposit box number '1749' at the Transohio/Akron Savings & Loan Company." Justification for this seizure and subsequent search was based upon the evidence that a gambling operation alleged by the police of this magnitude would result in currency in the amount of approximately $100,000. Further, this safe deposit box key was found next to currency in the approximate sum of $12,000. A most

reasonable and logical deduction would be any other funds, evidence or fruits of a crime might be in that safe deposit box. Accordingly, the officers obtained the second search warrant filed in this case April 27, 1981, supported by new affidavit which incorporated the old affidavit by reference. This procedure was specifically endorsed, as is demonstrated in United States of America v. Manufacturers National Bank of Detroit, et al., 536 F.2d 699 (1976).

It is interesting to note that the wife of the defendant was the only entrant into said safe deposit box as evidenced by the records furnished and presented by the prosecution, as denominated in State's Exhibit C. How frustrating it would be to law enforcement if a criminal could place the evidence or fruits of a crime in another's name and escape merely by that device.

Since there is no showing that the jewelry confiscated by the police in Defendant's Exhibit 3 was obtained by the commission of a crime or the fruits of a crime and for the further reason that jewelry was not specified in the warrant, they bear no reasonable relationship to the purpose of the search. See United States v. Russo, 250 F. Supp. 55 and United States v. Stern, 225 F. Supp. 187.

Finally, as to the motion to suppress or to return evidence filed by Minnie Gooden, the Court finds that under a reading of the Criminal Rule 12 (F) that it states:

> Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant.

Since Minnie Gooden is not a party to this action nor a defendant, she has no standing to complain about the seizure of evidence. Her remedy lies in civil law, and the Court hereby overrules that motion.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to suppress as filed by the defendant and the motion to return filed by one Minnie Gooden is hereby overruled.

James E. Murphy
Judge

cc: Ms. Nancy Kelley, Assistant City Prosecutor
Mr. John A. Dailey and Mr. James R. Willis, Attorneys for Defendant

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitutional Amendments:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT XIV

"***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "F"

Ohio Revised Code:

2915.02 (A) (2) Gambling

(A) No person shall:

. . .

(2) Establish, promote, or operate, or knowingly engage in conduct which facilitates any scheme or game of chance conducted for profit;

. . .

(D) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree.

2915.03 Operating a gambling house

(A) No person, being the owner or lessee, or having custody, control, or supervision of premises, shall:

. . .

(2) Recklessly permit such premises to be used or occupied for gambling in violation of section 2915.02 of the Revised Code.

(B) Whoever violates this section is guilty of operating a gambling house, a misdemeanor of the first degree. If the offender has previously been convicted of a gambling offense, operating a gambling house is a felony of the fourth degree

NO. 82-993

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALAN PATRICK,

Petitioner,

v.

CITY OF AKRON, STATE OF OHIO

Respondent

BRIEF OPPOSING WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS FOR SUMMIT COUNTY, OHIO

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VICTOR DANDREA
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STATEMENT OPPOSING WRIT OF CERTIORARI

The Writ of Certiorari ought not be granted merely to review evidence or inferences drawn from it. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938).

BRIEF OPPOSING JURISDICTION OF APPELLANT

PROPOSITION OF LAW NO. I:

The Court did not err in determining that the search warrant affidavit set forth probable cause to believe that a search of the Appellant's home would disclose the various items, the seizure of which was authorized thereby, and in concluding that the search made of, and the seizures made from the home here involved were in fact reasonable.

Probable cause for the search of 978 Wooster Avenue, was established by the Affidavit for Search Warrant. Probable cause was gained by police surveillance of numerous suspected "numbers runners" including Charles Roberson whose route began and ended at 978 Wooster Avenue, the home of Alan Patrick. That surveillance, coupled with other information is sufficient to authorize the search.

"Affidavit for Search Warrant, page 29.

"(106) Affiant has knowledge through the reading of the surveillance report submitted by Det. Smith, Det. Hill, and Det. Barath on April 2, 1981, that the following incidents took place on that date:

"(a) At 2:30 p.m., Charles Roberson arrived at Alan Patrick's residence (978 Wooster Avenue).

"(b) At 2:50 p.m., Roberson left Patrick's home with two passengers and went to the following locations and seemed to be delivering something at each of the following addresses:

* (1) 300 block of Trigonia

(2) 507 Rhodes Avenue

(3) 548 Douglas Street (See page 2, paragragh 4)

* (4) Nathan Street, between Thornton Street and Bowery Street.

* (5) Sheck Street (address unknown)

(6) S&S Tire Company, on Wooster Road in Barberton, just past the City limits. He dropped off his two passengers at this stop.

* (7) Roslyn Avenue

* (8) Greenwood Avenue

* (9) Winton Avenue

(10) Returned to Wooster Avenue at 4:45 p.m.

"Page 28. (104) The Affiant has knowledge through the reading of a confidential report submitted by Det. Randy Barath that the following took place on April 1, 1981:

"(a) At 12:03 p.m., a white over black Cadillac, known to be owned by Robert Thomas, was parked in front of 38 North Howard Street.

"(b) At 12:09 p.m., Charles Roberson arrived at 36 North Howard Street.

"(c) At 12:22 p.m., Charles Roberson left North Howard Street and drove to City Hospital, arriving at 12:26 p.m.

"(d) At 12:31 p.m., Charles Roberson left City Hospital and drove to 204 Division Street, arriving at 12:36 p.m.

"(e) At 1:09 p.m., Robert Thomas arrived at 204 Division Street driving his Cadillac.

"(f) At 1:32 p.m., both Thomas and Roberson left Division Street, at the same time. Roberson drove to 1138 Joy Avenue, arriving there at 1:44 p.m.

"(g) At 1:49 p.m., Roberson left 1138 Joy Avenue and went to Angelo's Bar at Howard and Lods Streets, arriving at 2:00 p.m.

"(h) At 2:07 p.m., Roberson left Angelo's Bar and drove to 978 Wooster Avenue, arriving at 2:35 p.m.

"(i) At 2:55 p.m., Roberson left 978 Wooster Avenue with a black male as passenger.

"(105) Affiant has knowledge through the reading of the surveillance report by Det. W. R. Smith on April 1, 1981, that the following incidents took place that date:

"(a) At 12:20 p.m., a heavy-set black female in her mid-forties came down to the lobby of City Hospital and went to the window and looked around as if she was looking for someone.

"(b) At 12:25 p.m., Charles Roberson came in the front door and started to talk to the woman. Det. Smith heard the following quote: 'Are you sure that your count was right?' 'I'm right,' she replied and he then said that 'It better always be right.' She handed him a small amount of papers and took some pills from a small brown pill bottle and handed them to him. With that he left.

"Page 27. (102) The Affiant has knowledge through the reading of the surveillance reports submitted by Det. Hill, Det. Barath, and Det. Smith that the following incidents occurred on March 31, 1981:

"(a) At 11:15 a.m., Charles Roberson was spotted at 38 North Howard Street driving Buick, OSL #LVK 875.

"(b) At 12:22 p.m., Roberson went to the Arch Street entrance of City Hospital where he parked his car and went

inside of the hospital for several minutes, He left the hospital and drove to 204 Division Street.

"(c) At 1:04 p.m., Charles Roberson left 204 Division Street and returned to 38 North Howard Street.

"(d) At 1:58 p.m., Charles Roberson left North Howard Street and went to 26 East Lods Street where he parked his car and went into the house, and then went from there to the rear door of Angelo's Bar at the corner of Howard and Lods.

"(e) At 2:42 p.m., Charles Roberson was seen arriving at 978 Wooster Avenue.

The addresses on Roberson's routes were also placed under surveillance and information establishing them as gambling houses was gained.

"Affidavit for Search Warrant

"Page 27 (103) The Affiant has knowledge through the reading of the confidential report submitted by Det. Joe Barclay on March 31, 1981, that the following incidents took place on that date:

"(a) Det. Barclay was asked to watch the activities as 36 and 38 North Howard Street. At 36 North Howard Det. Barclay observed a black male tell one of the barbers the number that he wanted to play and handed the barber a $10.00 bill. The barber then left and returned in about ten minutes. He then gave the man back his change for the ten dollars.

"(b) At approximately 3:30 p.m., at 38 North Howard Street there were approximately ten to twelve persons playing cards. There was no one playing pool. Det. Barclay overheard one person state "don't mention anything about numbers, that guy is a policeman'.

"Page 22. (93) The Affiant has knowledge through the reading of the surveillance report submitted by Det. Sgt. Lauer and Det. Contos that the following took place on March 4, 1981:

"(a) At 12:55 p.m., Charles Roberson arrived at 135 Tarbell Street driving his Buick, #LVK875. He went into the house and at 12:57 he went back to his car and left. Roberson drove to 204 Division Street where he stayed until 1:20 p.m.

"Page 13. (73) The Affiant has knowledge that Joseph Tolliver was arrested for Keeper of a place for Gambling on June 7, 1979, and was found 'Guilty' of that offense by Judge Colopy on April 14, 1980.

"Page 26. (100) Affiant has knowledge from reading the surveillance report submitted by Det. W. R. Smith and Det. Beitzel that the following incidents occurred on March 24, 1981:

"(a) At 2:40 p.m., a car later to be identified as the one belonging to Charles Roberson arrived at Alan Patrick's house on 978 Wooster Avenue.

"Page 13. (76) The Affiant has knowlege through the reading of a surveillance report submitted to him by Det. W. R. Smith on January 22, 1981, that 'the biggest numbers' man in Akron is Alan Patrick'. He received some of his bets through Ruby Calhoun. Alan Patrick is known to be living on the west side and also owns the red brick apartments at Fourth and Chittenden Streets, Akron, Ohio.

"(a) Affiant checked the phone number that was posted on the property at Fourth and Chittenden Streets, the sign read 'For Lease — 376-7641' and found it was listed as being the phone number of Sandra Patrick at 978 Wooster Avenue.

"(b) Det. W. R. Smith gained this information through Information Source Number WRS 81-1. This information source has proved to be reliable previously."

The above references, coupled with information contained with the Affidavit for Search Warrant on each of the "players," connects the 978 Wooster Avenue address, with the gambling operation with sufficient certainty to establish probable cause to search those premises for evidence of gambling as specified in the Warrant.

The Affidavit for Search Warrant for

978 Wooster Avenue, Akron, Ohio, is distinguished from the insufficient affidavit detailed in Spinelli v. U.S., 393 U.S. 410 (1969), in several ways. The Spinelli affidavit relied almost entirely upon an informant's tip. In the case at bar, months of surveillance of numerous "runners," was coupled with trash pickups and the linking of information about gambling at certain locations with a pattern of traveling around the city making 2- and 3-minute stops at these locations.

Charles Roberson was observed traveling to and from 978 Wooster Avenue on his way to these locations. The picking up of trash by and the in-house observations by police officers, indicated that the locations to which each of the runners traveled were engaged in gambling. One such location was 978 Wooster Avenue, the residence of Alan Patrick.

An Affidavit for a Search Warrant should be analyzed from a common sense point of view and in its entirety in determining its sufficiency, State v.

Furry, 31 Ohio App. 2d 107 (1971).

In a surveillance of a bookmaking operation wherein a number of officers from several different law enforcement agencies participated, the Ohio Supreme Court said.

"In sum we hold that the totality of the facts presented within the affidavit and the surrounding circumstances amply justify a finding of probable cause for issuing the warrant here..." State v. Thomas, 61 Oh. St. 2d 223, 15 Oh. Ops. 3d 234, 238 (1980)

In speaking of probable cause for the issuance of a search warrant the Supreme Court has said that:

"...only the probability and not a prima facie showing of criminal activity is the standard of probable cause." Beck v. Ohio, 85 Sup. Ct. 223 at 228 (1964).

In McCray v. Illinois, 87 Sup. Ct. 1056, 1062 (1967) it was said:

"...affidavits of probable cause are tested by much less rigorous standards than those governing the admissability of evidence at the trial."

A presumption in favor of the regularity of the issuance of the warrant exists, Rosanski v. State, 106 Ohio State 422; Howe v. State, 39 Ohio App. 78.

The Court in U.S. v. Manufacturers National Bank, 536 F.2d 699 (6th Cir.) (1976), held:

"In determining what is probable cause, the Commissioner is not called upon to determine whether the offense charged has in fact been committed. [Citing U.S. v. Eisner, 297 F.2d 595, 597 (6th Cir.) cert. denied, 369 U.S. 859 (1962)]. The magistrate to whom an application for a search warrant is presented must apply common sense standards [Citing U.S. v. Ventresca, 380 U.S. 102 (1965)]; and when a determination of probable cause has been made, it is entitled to great deference by reviewing courts. [Citing Spinelli v. U.S., 393 U.S. 410, 419 (1969)]." Jones v. U.S., 80 Sup. Ct. 725 (735-736) (1960).

The warrant authorizes a search and seizure of gambling paraphernalia. Plaintiff submits that the seizure of the computers was lawful as gambling paraphernalia based on the following facts which existed at the time of the search and as testified to at the motion hearing:

EXAMINATION OF OFFICER ALEXANDER:

Q. Did you also see some computers in the house?

A. Yes.

Q. Can you describe what you saw on the

computer screen?

A. On the screen ... there was a lot of things that I didn't understand. There was a printing that said advances, declines and changes.

Q. What did that indicate to you?

A. That someone had an interest in the stock exchange.

Q. Do you know any other reason to use those numbers?

A. Illegal lottery is taken from the New York Stock Exchange.
(S.H. p. 46)

CROSS-EXAMINATION OF OFFICER ALEXANDER:

Q. Officer, did I understand you correctly that when you saw these computers there was something visible on these computers.

A. The changes, advances, declines.

Q. Something visible to you?

A. Yes, sir.

Q. There's no question in your mind about that?

A. That there was something visible on the screen?

Q. Yes.

A. No, there is no question.
(S.H. p. 49)

Further, Defendant's wife, Sandra Patrick, testified that she was operating one of the subject computers when the police entered the room (S.H. p. 33). Additionally, defense witness Barry Brown testified that the computer was on at the time the officers entered and that there was something showing on the screen of the computer (S.H. p. 78, 79).

Three witnesses testified that the computer was activated at the time of the search. Thus, in deciding whether there was probable cause to seize the computers based on what was visible on the screen, the trier of fact must consider the sufficiency of the testimony of a trained officer and the weight of the testimony of defendant's witnesses.

Plaintiff further contends that although the computers were not specifically designated in the

warrant, the aforementioned facts support the contention that there was reasonable cause at the time of the search to believe they were instrumentalities of the offense charged:

"The legality of a seizure of items other than those specifically described in a search warrant depends on the relationship of the article to the crime being investigated and on reasonable cause to believe that the item was relevant to, or an integral part of the instrumentality of the crime, or a means of committing the offense charged. State v. Fields, 29 Ohio App. 2d 154 (1971) (Hdnte 4) Citing U.S. v. Russo, 250 F. Supp. 55 (1966) and U.S. v. Stern, 225 F. Supp. 187.

"Evidence not described in a valid search warrant but having a nexus with the crime under investigation may be seized at the time the described evidence is seized." U.S. v. Kane, 450 F.2d 77, 85: (1971) Cert. denied 92 Sup. Ct. 954 (1972).

When circumstances make an exact description of instrumentalities a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking, and it is sufficient if the items are identified in the warrant as precisely as their nature will permit. James v. U.S., 416 F.2d 467, 473 (1969) Cert. denied 397 U.S.

902 (1970).

It has been said that if the purpose of the search is to find a specific item of property it should be so particularly described in the warrant as to preclude the possibility of the officer seizing the wrong property; whereas on the other hand if the purpose is to seize not a specific item of property, but any property of a specified character which by reason of its character is illicit or contraband, a specific particular description of the property is unnecessary and may be described generally as to its nature or character People v. Schmidt, 473 P.2d 698, 700 (1970).

Plaintiff contends that the seizure of the safety deposit box key is analogous to the seizure of the computers. Said search was lawful in that there was probable cause to believe that it was evidence of an illegal gambling operation. As stated above, there is authority to seize items which may not be particularly designated in the warrant but may bear a

relationship to the purpose of the search.

The case of U.S. v. Manufacturers Bank, supra, presents facts that are applicable to the case at bar. In Manufacturers, a warrant was issued to search for evidence relating to illegal gambling. Approximately $3,000.00 in currency was located in the residence. During the course of the search of the defendant's residence, who was described in the affidavit as the "banker" for a numbers operator, Defendant James Wingate remarked that he had a safety deposit box but that he did not keep the key on the premises. He stated that the safety deposit box was at Manufacturers' Bank but did not disclose the location. Subsequently, the officers found in the residence a receipt for payment for a safety deposit box. Further investigation showed that the box, as indicated on the receipt, was closed and a larger box (No. 127) opened in the names of Azalia Wingate, wife of James Wingate, and Toni Wingate, daughter of James Wingate.

A search warrant was issued for safety deposit box No. 127 and the search yielded $502,200.00 in currency. A motion was made by Azalia Wingate and Toni Wingate for return of the property seized from the locked box. The Wingates argued that there was no probable cause for the search of the residence and that all information pertaining to the safety deposit boxes was derived from this search and should be suppressed as "fruit of the poisonous tree." Alternatively, they argued that even if the first search was lawful, the search of the safety deposit box was unlawful in that the affidavit for the search of the box was based on evidence discovered in the search of the residence. They contend that the magistrate could not rely on the first affidavit to cure deficiencies as to probable cause in the second affidavit.

Finding sufficient probable cause in the first affidavit, the Court held that the magistrate was entitled to consider the first affidavit in conjunction

with the second one presented the following day. The second affidavit referred specifically to the search warrant which the magistrate had issued the previous day. The court stated:

"It would needlessly restrict the discretion of a magistrate to hold that two affidavits filed so close in time and referring to a single criminal investigation which was still continuing could not be considered together in determining whether to authorize a further search. Manufacturers, supra, at 702."

The Court further noted that when read together, the two affidavits provided the basis for a reasonable inference that evidence of the numbers operation would be found in the safety deposit box and noted that "A magistrate may draw 'the usual inferences which reasonable men draw from evidence.'" Citing Johnson v. United States, 333 U.S. 10, 14 (1948).

During the course of the search of 978 Wooster Avenue, in addition to gambling paraphernalia, currency in the amount of $12,000.00 was found in a safe. Next to the currency was a safety deposit box

key. The officer seized the key based on the reasonable belief that additional currency would be found in the box. His belief was based on the size of the gambling operation as gleaned from prior observation and the fact that the key was found next to the currency. A second warrant was issued to search the safety deposit box. The affidavit from the first warrant was incorporated by reference in the affidavit for the second warrant.

The Plaintiff asserts that the $122,000.00 in currency found in the safety deposit box can be linked to illegal gambling and as in Manufacturers and Johnson, supra, the issuing judge could consider both affidavits together and draw the usual inferences which a reasonable man would draw from the evidence.

PROPOSITION OF LAW NO. II:

There is sufficient evidence as a matter of law to support the guilty verdicts in this case.

There was very minimal evidence of a viable full-time real estate business being transacted at 978 Wooster Avenue. Certainly, no evidence of such large scale operations requiring a computer, much less a second one.

It is alleged that the money taken from the safe deposit box was the life savings of Minnie Gooden. If one were to believe that Minnie Gooden would forego a 13% return on over $100,000 in today's money markets, the presence of the money still has not been satisfactorily explained. At the motion to suppress, (S.H. p. 12), we learn that the key to the safe deposit box was kept in a safe in the home of Alan Patrick. So Minnie Gooden must go to her son-in-law and into a safe to get to her own property (a key) to get to her life savings. Bear in mind, she does not live with the Patrick family.

How reasonable is it to believe the $122,600 in the safe deposit box was hers when the institution's record disclosed forty-three visits to this box during the contract term - forty-two by Sandra Patrick and one by Sgt. Lauer a policemen and none by her. (S.H. p. 11)?

The evidence for the state was a coalescence of direct and circumstantial quality buttressed by technical testimony deciphering the computer information.

One case held that it was error to strike an officer's testimony as to the meaning of letters and figures appearing on betting markers and similar documents admitted in evidence, where the officer was qualified by experience to give expert testimony on such matter. People v. Newman, 148 P2d 4, 7 (1944).

An inference is nothing more than a permissible deduction based upon the facts existing in evidence, and the jury (judge) is at liberty to find the ultimate

fact to be inferred one way or the other as it may be impressed by the testimony (emphasis added). Such a permissible inference does not violate due process as long as the evidence necessary to raise the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. State v. Nelson, 272 N.W. 2d 817, 819 (1978).

State v. Nabozny, 54 Ohio St. 2d 195 8 Ohio Ops. 3d 181, 186 (1978) was a case in which the Ohio Supreme Court refused to overturn a conviction where there was sufficient evidence of such a conclusive and persuasive force presented to the jury for it to determine on the facts, as it found them to be that there was no reasonable hypothesis other than guilt. emphasis added.

State v. Graven, 54 Ohio St. 2d 114 8 Ohio Ops. 3d 113 (1978) at page 118:

> "Thus where circumstantial evidence is relied upon to prove elements of the crime, as in the case 'sub judice,' the jury must find it to be of such a conclusive and persuasive force that it excludes every reasonable hypothesis of innocence."

Quoting Holland v. U.S., 384 U.S. 121, 140 (1954):

"Circumstantial evidence in this respect is intrinisically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result yet this is equally true of testimonial evidence, In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities."

Appellant's Appendix E is the finding of Judge Murphy at the conclusion of the trial heard by him after also hearing the suppression motion a few months earlier. His finding furnishes the reasons for conviction.

The defense claimed that the $12,000 found in his home by police was payment from the City of Akron, but offered no evidence in support thereof.

CONCLUSION

Illegal gamblers do not shout to the world their activity. Because of the illegaility, one attempts to escape detection. Successful detection and prosecution of offenders will often, as in this case, require close, prolonged scrutiny of one's actions, words, and contrived use of otherwise legitimate artifacts. The law must be applied to the particular fact pattern. One should not be permitted to go free because the case is not 100% bottomed on direct evidence, but instead is partially dependent or lawfully admitted inferences pointing inescapably to unlawful activity.

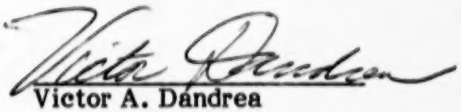
The 4th Amendment permits reasonable searches and seizures. In an electronic age born so soon after and co-existing with an age of extreme mobility by automobiles, the courts should not abdicate their responsibility to apply the law as dictated by the particular fact pattern before it. The

imaginative devices of an enterprising criminal ought not dazzle nor overwhelm the trier of fact to the point of escaping punishment.

Respondent requests denial of the Writ of Certiorari.

Respectfully submitted,

Robert D. Pritt
Director of Law



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PROOF OF SERVICE

A copy of this brief was sent by regular U.S. Mail to James R. Willis, Suite 1609 Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, this _____ day of _____, 1983.